

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-2909**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**T.C. #91-CV-005229**

**STEVEN NICOLET and CHRISTIANA NICOLET,**

**Plaintiffs,**

**MICHAEL COSTELLO and LAURA  
THOMPSON COSTELLO, husband and wife,  
and BRIAN L. READ,**

**Plaintiffs-Respondents,**

**v.**

**VILLAGE OF FOX POINT,**

**Defendant-Appellant.**

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**T.C. #92-CV-010068**

**STEVEN NICOLET and CHRISTIANA NICOLET,**

**Plaintiffs,**

**v.**

**VILLAGE OF FOX POINT,**

**Defendant.**

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T.C. #92-CV-017079  
BRIAN L. READ,

Plaintiff-Respondent,

v.

VILLAGE OF FOX POINT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. The Village of Fox Point appeals from a judgment entered in favor of Michael Costello, Laura Thompson Costello, and Brian L. Read. At issue is the legal title to part of a strip of land 745.3 feet in length located in Fox Point. The strip of land was conveyed to the Town of Milwaukee, Fox Point's legal predecessor in title, by a quitclaim deed from Calumet Land Company in 1904. The trial court held that the 1904 deed only conveyed an easement. Consequently, the Costellos and Read own the fee interest, subject to Fox Point's easement, in the portion of the strip of land that was adjacent to their properties. Fox Point contends that the 1904 deed conveyed a fee interest in the land. Alternatively, Fox Point contends that it has acquired the land by adverse possession. We reject Fox Point's arguments and affirm the judgment.

The deed to Fox Point provided in relevant part:

Witnesseth, that [Calumet Land Company], in consideration of One (\$1.00) Dollar and other valuable considerations, to it in hand duly paid, receipt whereof is hereby acknowledged, do hereby revise, release and

quitclaim unto [the Town of Milwaukee], its successors and assigns the following described real estate, situated in the County of Milwaukee and State of Wisconsin: [legal description]

To have and to hold the same with all appurtenances and privileges thereunto belonging or in any wise appertaining, and all the estate, right, title, interest and claims of [Calumet Land Co.], for the use and enjoyment of the public as a public street or highway forever and for no other purpose whatsoever.

The property was not platted, and the legal description in the deed follows Beach Drive for the property's westerly boundary and the low water mark of Lake Michigan for its easterly boundary.

The Costellos and Read own separate properties that abut the west edge of Beach Drive across from part of the tract conveyed to the Town of Milwaukee. Their properties were subdivided from larger tracts by surveys approved by Fox Point. Each survey included the land east of Beach Drive as part of the subdivided tracts. The Costellos and Read claim fee simple title to part of the strip of land based upon Fox Point's approval of the surveys and on their conclusion that, under Wisconsin law, a conveyance to a municipality for highway purposes conveys only an easement. Fox Point contends that it acquired the fee interest in the tract because the granting clause in the deed quitclaimed the described "real estate." It argues that the limitation in the habendum clause, if effective for any purpose, limited the estate conveyed to a determinable fee.

Relying upon established case law, the trial court concluded that the limitation, "for the use and enjoyment of the public as a public street or highway forever and for no other purpose whatsoever," made the grant an easement only. We agree with the trial court's conclusion.

This case is controlled by language in *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N.W. 881 (1910). At issue in *Thorndike* was whether the dedication by plat of a lot as a public square could be enforced by

the heirs of the dedicator. *Id.* at 5, 126 N.W. at 882-83. The court held that a statutory dedication by plat conveyed either a fee simple interest or a limited fee in trust to the municipality. *Id.* at 12, 126 N.W. at 885. In either event, no present interest remained in the dedicator that would allow the dedicator or his or her successors to enforce the limitation on the use of the lot. *Id.* at 13, 126 N.W. at 885. To reach this result, however, the court distinguished a long line of cases involving streets and roads. The court acknowledged that whether a municipality acquired property for highway purposes by condemnation, conveyance, common-law dedication, or statutory dedication by plat, the municipality acquired only an easement and the abutting landowners hold the fee. *Id.* at 15, 126 N.W. at 886. The court stated that the long line of cases created a uniform rule that had become a rule of property, and it could not be departed from even if the original decisions upon which it was based were doubtful. *Id.*

This uniform rule was expanded upon in *Stuart v. City of Neenah*, 215 Wis. 546, 255 N.W. 142 (1934), where the court was presented with a situation similar to the present case. The issue was the status of title to a strip of land located between a roadway and the edge of Lake Winnebago. *Id.* at 550, 255 N.W. at 143. The strip was dedicated to the public by plat. The court held that under the laws of the state, the city obtained an easement in the property that went to the edge of the water. *Id.* The owner whose property abutted the landward side of the road owned the fee under the road and to the shoreline. *Id.*

The “rule of property” announced in *Thorndike* and refined in *Stuart* controls the present case. Regardless of the granting language, the 1904 deed conveyed only an easement.

Alternatively, Fox Point contends that if the 1904 deed conveyed only an easement, it has acquired title to the disputed parcels by adverse possession. Any claim for adverse possession must be based upon physical possession of the property that is “hostile, open and notorious, exclusive and continuous for the statutory period.” *Leciejewski v. Sedlack*, 110 Wis.2d 337, 343, 329 N.W.2d 233, 236 (Ct. App. 1982), *aff’d*, 116 Wis.2d 629, 342 N.W.2d 734 (1984). For this purpose, “hostile” means that the possessor claims exclusive right to the land and that his or her possession prevents the assumption of possession by the true owner. *Id.*

Fox Point's argument has two weaknesses. First, as a general rule, the adverse possessor of property for street purposes acquires an easement, not fee title. *Walker v. Green Lake County*, 269 Wis. 103, 111, 69 N.W.2d 252, 256-57 (1955). Second, Fox Point has the right to use the surface of the contested parcels, as well as the remaining portions of the strip of land, as long as the property is used “for the use and enjoyment of the public as a public street or highway.” Activity consistent with this use is not hostile and adverse to the fee owners. Consistent uses include those that are incidental to the use of a street for public travel or for the safe and convenient use of the roadway, *Randall v. City of Milwaukee*, 212 Wis. 374, 378, 249 N.W. 73, 74-75 (1933), and those which protect a roadway, *Walker*, 269 Wis. at 112, 69 N.W.2d at 257.

The parties filed reciprocal motions for summary judgment, and we assume that the facts contained in the affidavits are true. See *Silverton Enters., Inc. v. General Casualty Co.*, 143 Wis.2d 661, 669, 422 N.W.2d 154, 157 (Ct. App. 1988) (practical effect of reciprocal summary judgment motions is stipulation as to facts and agreement that issues presented can be decided as a matter of law). According to the facts set forth in the affidavits, Fox Point occasionally asserted authority over the property that exceeded the authority of an easement holder. At other times, however, it acted after consulting with the abutting landowners. Because the affidavits do not show consistent activity hostile and adverse to the interests of the fee owners, Fox Point has not established that it adversely possessed the disputed tracts for any time period.

*By the Court.* – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.